

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN A. WILHEM and DEPARTMENT OF TRANSPORTATION,
U.S. COAST GUARD, Curtis Bay, MD

*Docket No. 01-994; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On March 1, 1999 appellant, then a 65-year-old material handler, filed a claim for compensation alleging that he sustained a hearing loss in the course of his federal employment. Appellant stated that he first became aware of his condition and realized that it was caused or aggravated by his employment in February 1994. The Office accepted appellant's claim for bilateral sensorineural hearing loss. The employing establishment indicated that appellant retired on May 28, 1999.

Accompanying appellant's claim were employing establishment audiograms dated February 12, 1986 to August 4, 1998; employing establishment medical records dated March 1991 to June 1998; a hearing evaluation from Dr. M.A. Getka, a Board-certified family practitioner, and employing establishment physician, dated December 18, 1998; and a narrative statement from appellant. The employing establishment audiograms dated February 12, 1986 to August 4, 1998 revealed progressive bilateral hearing loss. The hearing evaluation from Dr. Getka dated December 18, 1998 noted that appellant sustained bilateral high frequency hearing loss and the doctor recommended hearing aids. The audiogram performed on behalf of the doctor on December 14, 1998 revealed mild sloping to severe bilateral sensorineural hearing loss. Appellant indicated in his narrative statement that he was exposed to hazardous noise from table saws and forklifts from the period of 1984 to the present as a material handler and forklift operator.

In a letter dated May 4, 1999, the Office referred appellant, together with a statement of accepted facts, the medical record, audiograms and exposure information to Dr. Kiran B. Shah, a Board-certified otolaryngologist, for otologic examination and audiological evaluation.

In a report dated May 25, 1999, Dr. Shah indicated that appellant's work involved daily noise exposure to old equipment. He diagnosed bilateral sensorineural hearing loss, mild in low

frequencies and moderate to severe in high frequencies. Dr. Shah determined that appellant had reasonably good speech discrimination. Dr. Shah reported that appellant had a family history of hearing loss. An accompanying May 25, 1999 audiogram, taken on the doctor's behalf, reported that testing for appellant's left ear at 500, 1,000, 2,000 and 3,000 cycles per second showed decibel losses of 35, 40, 50 and 80 by air conduction, respectively, while testing for the right ear revealed decibel losses of 40, 50, 65 and 75, by air conduction, respectively. Dr. Shah recommended that bilateral hearing aids be issued to appellant.

The Office accepted appellant's claim for a bilateral sensorineural hearing loss and appellant filed a claim for a schedule award on August 17, 1999.

On November 8, 1999 an Office medical adviser reviewed Dr. Shah's report and the audiometric test of May 25, 1999. The medical adviser determined that appellant sustained a 41 percent binaural hearing loss.

In a decision dated November 26, 1999, the Office granted appellant's claim for a schedule award for a 41 percent binaural hearing loss. The award was for 82 weeks of compensation from May 25, 1999 to December 19, 2000.

By letter postmarked October 30, 2000, appellant requested a review of the written record in the decision dated November 26, 1999.

By decision dated February 16, 2001, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

The Board finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.¹ The Office's regulations expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing."² The Office provided that such review of the written record is also subject to the same requirement that the request must be made within 30 days of the Office's final decision.³

The Office properly found that appellant's request for a review of the written record was untimely. His October 30, 2000 request for review of the written record was made more than 30 days after the Office's November 26, 1999 decision.

¹ 5 U.S.C. § 8124(b).

² See 20 C.F.R. §§ 10.615-10.616 (1999).

³ See *id.*

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁴ The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.⁵

The Board finds that the Office properly exercised its discretion by further denying appellant's request upon finding that he could have the matter further addressed by the Office through a reconsideration request along with the submission of new medical evidence.⁶

The February 16, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁴ *Herbert Holley*, 33 ECAB 140 (1981).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601 (October 1992).

⁶ With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).